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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177301
Party	Plaintiff Cake Divas
Correspondence Address	Anthony M. Keats, Esq. Keats, McFarland & Wilson LLP 9720 Wilshire Boulevard, Penthouse Suite Beverly Hills, CA 90212 UNITED STATES kgatien@kmwlaw.com, dorme@kmwlaw.com, akeats@kmwlaw.com
Submission	Other Motions/Papers
Filer's Name	Matthew D. Klafter
Filer's e-mail	mklafter@kmwlaw.com, kgatien@kmwlaw.com
Signature	/s/
Date	03/04/2009
Attachments	MSJ - Req for Recon.pdf (27 pages)(763093 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 76/529,077
Published in the *Official Gazette* of May 8, 2007

Cake Divas,	)	
	)	Opposition No. 91177301
Opposer,	)	
	)	
v.	)	
	)	
Charmaine V. Jones,	)	
	)	
Respondent.	)	
	)	
	)	

OPPOSER'S REQUEST FOR RECONSIDERATION
OF ORDER ISSUED FEBRUARY 23, 2009

Opposer Cake Divas ("Opposer") hereby respectfully submits its request for reconsideration of the Order issued on February 23, 2009 (the "Order").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On February 23, 2009, the Interlocutory Attorney issued the Order, *inter alia*, granting Charmaine V. Jones' ("Respondent") motion to strike ("Motion to Strike") as untimely Opposer's motion for summary judgment ("MSJ"). Significantly, Respondent's Motion to Strike was filed electronically on February 19, 2009, and served on Opposer's counsel via U.S. mail that day. Accordingly, the Order was granted *before* Opposer even received Respondent's motion.

The facts of this matter are unusual in that Opposer had no opportunity to respond to Respondent's underlying Motion to Strike. Accordingly, while procedurally Opposer's motion is a request for reconsideration, it may properly be viewed as an opposition to Respondent's motion because this is the first opportunity Opposer has had to respond to the Motion to Strike.

Opposer's MSJ is fit for a decision on the merits at this time. Because Opposer's motion may be heard within the Board's sound discretion and because hearing the motion serves the sound public policy of judicial economy, Opposer respectfully submits that that its request for reconsideration should be granted.

II. PROCEDURAL HISTORY

On May 15, 2007, Opposer initiated this opposition proceeding based on Opposer's priority of use of its CAKE DIVAS mark and a likelihood of confusion arising from the concurrent use of the parties' respective marks. (See Declaration of Matthew D. Klafter in Support of Opposer's Motion for Summary Judgment ("Klafter MSJ Decl."), ¶ 1.)

On July 25, 2007, Respondent filed her answer to the Opposition. (Id., ¶ 2.)

On September 10, 2008, pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure ("FRCP"), Opposer served Respondent with its First Set of Interrogatories and First Set of Requests for Production of Documents and Things. (See Klafter MSJ Decl., ¶ 3; and Exhs. 1 and 2 thereto.)

On September 22, 2008, Respondent served Opposer with her First Set of Interrogatories and First Set of Requests for Production of Documents and Things. (See Klafter MSJ Decl., ¶ 4; and Exhs. 3 and 4 thereto.)

On October 14, 2008, Respondent served her responses to Opposer's discovery requests. (See Klafter MSJ Decl., ¶ 5; and Exhs. 5 and 6 thereto.) Respondent's Interrogatory responses

were not verified and did not contain a single substantive response. (See Klafter MSJ Decl., ¶ 5; and Exhs. 5 and 9 thereto.)

On October 27, 2008, Opposer served its responses to Respondent's discovery requests. (See Klafter MSJ Decl., ¶ 6; and Exhs. 7 and 8 thereto, respectively.)

On November 4, 2008, counsel for Opposer sent a letter to counsel for Respondent pursuant to FRCP 37 and Rule 2.120(e) of the Trademark Rules of Practice, requesting a pre-filing conference of counsel to address Respondent's inadequate and incomplete discovery responses in violation of FRCP 33 and 34. (See Klafter MSJ Decl., ¶ 7; and Exh. 9 thereto.) Opposer's letter specified in detail the deficiencies of Respondent's responses and demanded that Respondent supplement its responses. (See id., Exh. 9.)

On November 6, 2008, counsel for the respective parties participated in a telephonic meet-and-confer regarding Respondent's discovery responses during which Respondent's counsel agreed, among other things, to supplement Respondent's responses. (See Klafter MSJ Decl., ¶ 8.)

On November 21, 2008, pursuant to the parties' telephonic conference, Respondent supplemented her interrogatory responses, and produced additional documents. (See Klafter MSJ Decl., ¶ 9; and Exhs. 10 and 11 thereto.)

On November 24, 2008, counsel for Opposer sent a letter to Respondent's counsel requesting that Respondent confirm that all documents had been produced in response to Opposer's interrogatories and requests for production. (See Klafter MSJ Decl., ¶ 10; and Exh. 12 thereto.)

On December 1, 2008, counsel for Respondent sent an e-mail to Opposer's counsel confirming that Respondent had produced all responsive documents to Opposer's interrogatories and requests for production. (See Klafter MSJ Decl., ¶ 11; and Exh. 13 thereto.)

On December 22, 2008, Respondent's attorney sent an e-mail to Opposer's attorneys stating "Schiff Hardin is planning on withdrawing as counsel for the Applicant from the above referenced proceeding *within the next week or so*" and requesting a sixty (60) suspension of all dates in the proceeding. (Declaration of Matthew D. Klafter in support of Opposer's Request for Reconsideration ("Klafter Req. Decl."), ¶ 1, Exh. 1.) That same day, Opposer's attorneys sent an e-mail to Respondent's attorney informing her of Opposer's intent to file its MSJ. (Id., ¶ 2, Exh. 2). In that e-mail, Opposer's attorneys confirmed Opposer's intention of filing its MSJ at the earliest possible date because Opposer believed that based on the full and complete exchange of discovery, that the matter was fit for a decision. (Id.) In response to Respondent's request for an extension of trial dates, Opposer tentatively denied the request stating, "if your firm does in fact withdraw as counsel, then assuming an extension to respond to the motion is requested by new counsel, we will consider the request at the appropriate time." (Id.) Respondent's attorneys apparently immediately filed their motion to withdraw, but did not serve Opposer's attorneys with copy of the motion. (Id.) Accordingly, Opposer's attorneys were not aware of Respondent's attorney's motion to withdraw. (Id.)

On January 15, 2009, Opposer filed its MSJ, which Opposer served on Respondent and its former counsel. (See Klafter Req. Decl., ¶ 4.)

On January 23, 2009, Respondent's newly appointed counsel sent an e-mail to Opposer's counsel requesting a 60-day extension of time to respond to the MSJ. (See id., ¶ 5, Exh. 3.)

On January 23, 2009, Opposer's counsel sent an e-mail to Respondent's counsel agreeing to a 30-day extension of time to respond to the MSJ. (See id., ¶ 6, Exh. 4.)

On January 26, 2009, Respondent's counsel sent an e-mail to Opposer's counsel insisting on a 60-day extension of time to respond to the MSJ. (See id., ¶ 7, Exh. 5.)

On February 4, 2009, Opposer's counsel sent an e-mail to Respondent's counsel agreeing to a 60-day extension of time to respond to the MSJ. (See id., ¶ 8, Exh. 6.)

On February 6, 2009, *after the parties had agreed to an extension of time to respond to Opposer' MSJ*, Respondent's counsel sent an e-mail to Opposer's counsel stating that Respondent intended to move to strike Opposer's motion unless Opposer agreed to withdraw and not re-file the motion. (See id., ¶ 9, Exh. 7.)

On February 6, 2009, Respondent's counsel sent a letter to Opposer's counsel declining Respondent's request to withdraw its MSJ on the basis that this matter is fit for a decision. (See Klafter Req. Decl., ¶ 10, Exh. 8.)

On February 19, 2009, Respondent filed its motion to strike Opposer's MSJ ("Motion to Strike"), which Respondent served on Opposer's counsel via U.S. mail.

On February 23, 2009, the Interlocutory Attorney issued the February 23, 2009, Order granting Respondent's Motion to Strike.

To date, no testimony has been taken by either party. (Klafter Req. Decl., ¶ 11.)

III. ARGUMENT

A. Legal Standards.

1. Request for Reconsideration.

A request for reconsideration of an order issued on a motion may be made within one month from the date of the order. 37 C.F.R. § 2.127(b); Barron Philippe de Rothschild S.A. v.

Styl-Rite Optical Mfg. Co., 55 U.S.P.Q.2d 1848, 1854 (T.T.A.B. 2000). Opposer's request is timely and should be heard.

2. Motion to Strike as Untimely Opposer's MSJ.

As a general rule, a motion for summary judgment should be filed prior to the commencement of the first testimony period, as originally set or as reset. TBMP § 528.02. However, the decision to hear a motion for summary judgment filed after that time is discretionary. Id. See also 37 C.F.R. § 2.127(e)(1). Therefore, the Board may hear a motion for summary judgment filed after the commencement of the first testimony period in its discretion if the policy of judicial economy underlying the rule is served. Because Opposer's motion for summary judgment is fit for a decision on the merits and serves the purpose of judicial economy, the motion should be heard.

B. Argument.

1. Judicial Economy Is Best Served By Hearing Opposer's Motion for Summary Judgment.

"[A] motion for summary judgment is a pretrial device, intended to save the time and expense of a full trial when a party is able to demonstrate, prior to trial, that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law." TBMP § 528.02.

Significantly, the TTAB follows the Federal Rules of Civil Procedure, which provide that "[a] party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim ... ***at any time*** after: (1) 20 days have passed from commencement of the action; or (2) the opposing party serves a motion for summary judgment." Fed. R. Civ. P. 56(a) (emphasis added).

The public policy underlying both the rules of the TTAB and the Federal Rules of Civil Procedure are the same: Judicial economy.

Judicial economy is best served by hearing Opposer's MSJ at this time.

- Discovery has been fully exchanged and there are no outstanding discovery disputes (see Klafter MSJ Decl., ¶¶ 3-11 and Exhs. 1-13);
- No testimony has been taken by either party (Klafter Req. Decl., ¶ 11.); and
- This dispute is limited to a single issue: priority.[1]

It is undisputed that discovery has been fully exchanged. Moreover, *Respondent has confirmed that she has produced all responsive documents to Opposer's discovery requests upon which Respondent intends to rely at trial.* (See Klafter MSJ Decl., ¶ 11; and Exh.13 thereto). Therefore, the entire universe of documents is available to the Board and a decision may be rendered on the merits as a matter of law.

Because no testimony has been taken by either party, the parties have not incurred any costs or expended any resources on issues related to trial. Thus, the general policy of denying a motion for summary judgment during the trial period as being untimely in order to preserve the parties' time and resources is not invoked, and the matter should be heard in the Board's discretion.

Significantly, prior to filing Respondent's Motion to Strike, Respondent's counsel requested and was granted a 60-day extension of time, until April 20, 2008, in which to respond to Opposer's MSJ. Respondent made this request knowing full well that Opposer's motion had been filed during its testimony period. Despite the parties' agreement, Respondent filed its Motion to Strike seeking to avoid a decision on the merits based on a perceived procedural technicality.

No such technicality exists.

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[1] As set forth in Opposer's MSJ, this dispute is based on a simple matter of priority. Based on the parties' discovery responses, which Respondent has confirmed are complete, Respondent cannot establish her date of first use of June 15, 1993, as claimed in her application for the CAKEDIVA mark. Therefore, there is no genuine issue of material fact and Opposer's MSJ is fit for a decision at this time.

Hearing a motion for summary judgment filed during the testimony period is within the Board's sound discretion. 37 C.F.R. § 2.127(e)(1); TBMP § 528.02.

"The purpose of the motion is judicial economy." TBMP § 528.01.

Insofar as "judicial economy" is concerned, Opposer's MSJ falls squarely within the underlying policy interests of the Board. Here, discovery is complete, no testimony has been taken by either party, and the MSJ is limited to a single issue: Priority. All evidence upon which the parties have confirmed they will rely in this case will be before the Board.

No party will be prejudiced by hearing Opposer's motion. Respondent will not, as she contends in her Motion to Strike, be deprived of a decision "on the merits." If Opposer's motion is heard and denied, the parties will proceed to trial. However, if Opposer's motion is not heard, the possibility of rendering a pre-trial decision will be forever lost, forcing the parties to, perhaps needlessly, incur the significant costs and expenses of a trial to resolve an issue that could have been decided at this time. Thus, hearing Opposer's motion for summary judgment at this time will serve the sound public policy of conserving the parties' and the Board's time and resources.

IV. CONCLUSION

Based on the foregoing, Opposer respectfully requests that Respondent's Motion to Strike be DENIED and that Opposer's motion for summary judgment be heard by the Board on a schedule to be set forth by the Interlocutory Attorney.

Respectfully submitted,

Dated: March 4, 2009

Matthew D. Klafter
Keats McFarland & Wilson LLP
Attorney for Opposer, Cake Divas
9720 Wilshire Blvd., Penthouse Suite
Beverly Hills, CA 90212
Telephone: (310) 248-3830

DECLARATION OF MATTHEW D. KLAFTER
IN SUPPORT OF OPPOSER'S REQUEST FOR RECONSIDERATION OF ORDER ISSUED FEBRUARY 23, 2009

I, Matthew D. Klafter, hereby declare and state:

I am a member of the Bar of the State of California and am an associate at Keats McFarland & Wilson, LLP, attorneys for Opposer, Cake Divas. I make this declaration in support of Opposer's Request for Reconsideration of Order Issued February 23, 2009. All statements made herein are of my own knowledge and are true; all statements made on information and belief are believed by me to be true; if called upon, I could and would testify competently to them.

2. On December 22, 2008, Respondent's counsel sent an e-mail to Opposer's counsel. A true and correct copy of that correspondence is attached hereto as **Exhibit 1**.

3. On December 22, 2008, Opposer's counsel sent an e-mail to Respondent's counsel. A true and correct copy of that correspondence is attached hereto as **Exhibit 2**.

4. On December 22, 2008, Respondent's counsel filed their motion to withdraw, but did not serve Opposer's counsel with copy of the motion. Accordingly, Opposer's counsel were not aware of Respondent's counsel's motion.

5. On January 15, 2009, Opposer filed its motion for summary judgment, which Opposer served on Respondent and her former counsel.

6. On January 23, 2009, Respondent's newly appointed counsel sent an e-mail to Opposer's counsel requesting a 60-day extension of time to respond to the MSJ. A true and correct copy of that correspondence is attached hereto as **Exhibit 3**.

7. On January 23, 2009, Opposer's counsel sent an e-mail to Respondent's counsel agreeing to a 30-day extension of time to respond to the MSJ. A true and correct copy of that correspondence is attached hereto as **Exhibit 4**.

8. On January 26, 2009, Respondent's counsel sent an e-mail to Opposer's counsel insisting on a 60-day extension of time to respond to the MSJ. A true and correct copy of that correspondence is attached hereto as **Exhibit 5**.

9. On February 4, 2009, Opposer's counsel sent an e-mail to Respondent's counsel agreeing to a 60-day extension of time to respond to the MSJ, or until April 20, 2009. A true and correct copy of that correspondence is attached hereto as **Exhibit 6**.

10. On February 6, 2009, *after the parties had agreed to an extension of time to respond to Opposer' MSJ*, Respondent's counsel sent an e-mail to Opposer's counsel stating that Respondent intended to move to strike Opposer's motion unless Opposer agreed to withdraw and not re-file the motion. A true and correct copy of that correspondence is attached hereto as **Exhibit 7**.

11. On February 6, 2009, Respondent's counsel sent a letter to Opposer's counsel declining Respondent's request to withdraw its MSJ on the basis that this matter is fit for a decision. A true and correct copy of that correspondence is attached hereto as **Exhibit 8**.

12. To date, no testimony has been taken by either party.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed March 4, 2009, in Beverly Hills, California.

Matthew D. Klafter

CERTIFICATE OF SERVICE
In the Matter of Application Serial No. 76/529,077
Cake Divas v. Charmaine V. Jones
Opposition No. 91177301

I hereby certify that on January 15, 2008, I served the following document(s)

1. **Opposer's Request for Reconsideration of Order Issued February 23, 2009;**

2. **Declaration of Matthew D. Klafter**

upon counsel for Applicant named below:

Karin Segall
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016

by placing a true and correct copy thereof in a sealed envelope, postage prepaid, in First Class U.S. mail, for collection and mailing with the United States Postal Service on the same date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 4, 2009, in Beverly Hills, California.

Matthew D. Klafter

EXHIBIT 1

Konrad Gatien

From: Greendorfer, Lori D. [LGreendorfer@schiffhardin.com]
Sent: Monday, December 22, 2008 10:20 AM
To: Konrad Gatien; Matthew Klafter
Subject: Cakediva, Opposition No. 91177301

Dear Konrad and Matthew,

Schiff Hardin is planning on withdrawing as counsel for the Applicant from the above referenced proceeding within the next week or so. Under these circumstances, we would like to request your agreement to a 60-day extension of all time periods in this proceeding in order to give the Applicant time to retain new counsel. As of this time, Schiff Hardin still represents Ms. Jones, the Applicant, in connection with any settlement discussions of this matter.

Please let me know at your earliest convenience your response to the above request and please do not hesitate to contact me if you have any questions. Thank you.

Regards,
Lori

Lori D. Greendorfer | Schiff Hardin LLP
900 Third Avenue, 24th Floor
New York, New York 10022

Direct: 212.745.0814
Fax: 212.753.5044
Email: Lgreendorfer@schiffhardin.com

Exhibit 2

Konrad Gatien

From: Matthew Klafter
Sent: Monday, December 22, 2008 11:51 AM
To: 'Greendorfer, Lori D.'
Cc: Anthony M. Keats; Konrad Gatien
Subject: RE: Cakediva, Opposition No. 91177301

Dear Ms. Greendorfer,

Thank you for your courtesy correspondence of today's date in which you informed our office that Schiff Hardin may be withdrawing as litigation counsel for Ms. Jones in connection with the above-referenced proceeding. Please note that based on the discovery exchanged between the parties, it is our client's position that your client does not have the rights she claims to have for the CAKEDIVA mark. Thus, our client has instructed us to promptly file a motion for summary judgment. As such, we cannot agree to the extension you have requested below, and we will file the motion at the earliest possible date. Please confirm whether you are authorized to accept the motion on behalf of Ms. Jones or whether we should serve the motion upon Ms. Jones (or her newly designated counsel, if you are aware of any such designation). Please note that if your firm does in fact withdraw as counsel, then assuming an extension to respond to the motion is requested by new counsel, we will consider the request at the appropriate time.

Sincerely,

Matt Klafter

Matthew D. Klafter
KEATS McFARLAND & WILSON LLP
9720 Wilshire Boulevard
Penthouse Suite
Beverly Hills, California 90212
Telephone: (310) 248-3830
Facsimile: (310) 860-0363
Direct: (310) 777-3736

Exhibit 3

Konrad Gatien

From: Segall, Karin [KSegall@foley.com]
Sent: Friday, January 23, 2009 10:51 AM
To: Konrad Gatien; Matthew Klafter
Subject: Cake Divas v. Charmaine Jones (Our Ref: 999400-3108)
Importance: High

Dear Mssrs. Gatien and Klafter:

This email confirms the voice mail messages I left for each of you.

Our firm has been retained by Charmaine Jones in connection with the CAKEDIVA opposition. We are intending to file an appearance with the TTAB along with a motion for a 60-day extension of time to respond to the outstanding summary judgment motion. As you can appreciate, we are new to this long pending case and are still now just receiving the files. Accordingly, we will need some time to get up to speed. We would prefer to file this motion with your consent if possible. Please therefore let us know by return email or telephone call whether you will be willing to consent to this extension.

Sincerely,

Karin Segall
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016
Tel.: (212) 682-7474 (main)
Tel.: (212) 338-3529 (direct)
Fax: (212) 687-2329

Exhibit 4

Konrad Gatien

From: Konrad Gatien
Sent: Friday, January 23, 2009 4:33 PM
To: 'Segall, Karin'
Cc: Matthew Klafter; Darrell V. Orme
Subject: RE: Cake Divas v. Charmaine Jones (Our Ref: 999400-3108)
Importance: High

Dear Ms. Segall – It is a pleasure to make your acquaintance. As you may have noted from our motion for summary judgment, the only issue in this action is whether your client can establish her priority. After reviewing the entire universe of documents produced by our respective clients, we do not believe that your client can do so. This is the basis for our motion. We have included the documents, except for those withheld based on claims of privilege, in the motion. Given the simplicity of the issue involved and that all of the relevant documents are attached to our motion, we do not believe an additional 60 days is warranted. The motion was served on your client by mail on January 15, 2009. Accordingly, your client's opposition is due on or before February 20, 2009. Although we believe it is possible for your firm to respond to the motion comfortably within that time (given the single issue involved and the limited number of documents at issue) we are willing as a courtesy to stipulate to an additional 30 days, or until March 20, 2009, for your client to file her opposition. If this is acceptable to your client, please confirm same and proceed with filing your motion to extend time to respond until March 20, 2009, with our consent. You may serve notice of the consented to motion to extend until March 20, 2009, upon our office via electronic mail. Please copy both me and Matthew Klafter.

Please note I will be out of the office all of next week and returning on February 2. If you have any questions, or would like to discuss this matter during that time, please contact Matthew Klafter via email or at (310) 777-3736.

Best regards,
Konrad Gatien

Konrad K. Gatien, Esq. | Keats McFarland & Wilson LLP | 9720 Wilshire Boulevard, Penthouse Suite | Beverly Hills, California 90212
direct dial 310.777.3735 | main line 310.248.3830 | facsimile 310.860.0363 | email kgatien@kmwlaw.com

Exhibit 5

Konrad Gatien

From: Segall, Karin [KSegall@foley.com]

Sent: Monday, January 26, 2009 7:44 AM

To: Konrad Gatien

Cc: Matthew Klafter; Darrell V. Orme

Subject: RE: Cake Divas v. Charmaine Jones (Our Ref: 999400-3108)

Dear Mr. Gatien and Mr. Klafter:

Thank you for the quick reply. Although I appreciate your take on the merits of the case, I hope that you can appreciate that I cannot even evaluate your perspective without a file, and of course I need to form my own opinion of the case. By way of example, the motion papers do not include all of the correspondence between the parties (and of course the privileged correspondence between our client and her prior counsel). Naturally, we deserve the benefit of these papers and the time to review them, not only to be able to respond to the motion, but also to evaluate the case in its entirety. Of course, as new counsel, we wish to explore all options for proceeding, including but not limited to settlement.

Please therefore reconsider the 60-day period that we requested. We consider this request to be more than reasonable under the circumstances. Failing your consent, we may have no choice but to file the motion with the Board. We would rather not waste the Board's resources on such a motion, but we are confident that the motion would be granted.

Regards,

Karin Segall

Exhibit 6

Konrad Gatien

From: Konrad Gatien

Sent: Wednesday, February 04, 2009 4:34 PM

To: 'Segall, Karin'

Cc: Matthew Klafter; Darrell V. Orme

Subject: RE: Cake Divas v. Charmaine Jones (Our Ref: 999400-3108)

Dear Ms. Segall – Without prejudice to our position that three months to review this matter and respond to our client's motion is unwarranted, as set forth in our prior correspondence, as a courtesy we will agree to the requested stipulation. You may serve notice of the consented to motion to extend until April 20, 2009, upon our office via electronic mail.

Sincerely,
Konrad

Konrad K. Gatien, Esq. | Keats McFarland & Wilson LLP | 9720 Wilshire Boulevard, Penthouse Suite | Beverly Hills, California 90212
direct dial 310.777.3735 | main line 310.248.3830 | facsimile 310.860.0363 | email kgatien@kmwlaw.com

Exhibit 7

Konrad Gatien

From: Segall, Karin [KSegall@foley.com]
Sent: Friday, February 06, 2009 8:09 AM
To: Konrad Gatien
Cc: Matthew Klafter; Darrell V. Orme; Rundlof, Dana C.
Subject: RE: Cake Divas v. Charmaine Jones (Our Ref: 999400-3108)

Dear Konrad:

Thank you for extending this courtesy. Upon a closer review of the timing of your motion, we have noticed that it was filed on January 15, 2009, after the opening of your client's testimony period on December 25, 2008. As such, we are planning to move to strike the motion as untimely. See TBMP Sec. 528.02 and 37 C.F.R. Sec. 2.127(e)(1). Accordingly, we will not need the additional time to review the file and respond substantively to the motion. Of course, if you would prefer to withdraw and not re-file the motion, we can agree to reset the testimony period and resume the proceeding.

Sincerely,

Karin Segall

Exhibit 8

KEATS McFARLAND & WILSON LLP

ATTORNEYS AT LAW

TEL (310) 248-3830
FAX (310) 860-0363

9720 WILSHIRE BOULEVARD
PENTHOUSE SUITE
BEVERLY HILLS, CALIFORNIA 90212

www.kmwlaw.com

WRITER'S DIRECT DIAL
(310) 777-3735

WRITER'S EMAIL
kgatien@kmwlaw.com

February 6, 2009

VIA ELECTRONIC MAIL
Karin Segall
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016

Re: ***Cake Divas v. Jones, T.T.A.B. Opp. No. 91177301***

Dear Ms.Segall:

We respectfully decline the request contained in your e-mail of today's date to withdraw and not re-file our client's motion for summary judgment ("Motion").

This is not a matter that warrants proceeding to trial; it is fit for a ruling and should be decided by the Board at this time. If you proceed with filing your intended motion to strike, we will oppose it in the interest of conserving the parties' and the Board's time and resources. As you are aware, the decision to hear a motion for summary judgment is discretionary and we believe the merits of the case and interests of all concerned would best be served by having the Motion considered promptly.

This matter has been pending before the Board since May 2007. Moreover, on January 23, 2009, your client requested an additional 60 days (or 90 days from the date the Motion was filed on January 15, 2009), to respond to the Motion. As you stated in your e-mail of January 26, 2009, the purpose of requesting the 60-day extension was to "evaluate the case in its entirety....[and] to explore all options for proceeding, including but not limited to settlement." We agreed. There is no reason your client should not be able to respond to the Motion in that length of time.

Although we had assumed the request to extend time to respond to the Motion was made in good faith, apparently that was not the case and your client has no intention of responding. We ask that your client reconsider her intended course of action, which appears only to serve the purpose of delaying this matter and increasing the cost of litigation for the parties.

Very truly yours,

Konrad K. Gatien, for
Keats McFarland & Wilson LLP

KKG/dvo
Cc: Anthony M. Keats
Matthew D. Klafter